



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	333
vs.	)	Filed December 29, 1982
BRENDA LEE FLEENER,	)	
Defendant-Appellant.	)	<u>2-325</u> 66640

Appeal from Story District Court - David R. Hanson, Judge.

Defendant appeals her conviction of burglary in the second degree in violation of Iowa Code §§ 713.1 and 713.3 (1979). AFFIRMED.

Gregory W. Steensland of Payer, Steensland & Lathrop, Ames, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Steven M. Foritano, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

Defendant, Brenda Lee Fleener, appeals her conviction of burglary in the second degree in violation of Iowa Code §§ 713.1 and 713.3 (1979). On appeal defendant asserts that she was denied her right of confrontation of witnesses under the sixth and fourteenth amendments to the United States Constitution. She contends that her rights were violated by the admission into evidence of statements made by an unavailable accomplice that the accomplice was involved in the burglary. She also contends that the trial court erred in overruling her motion for judgment of acquittal based on the lack of corroboration of an accomplice's testimony. We affirm.

Our scope of review is on assigned errors at law. Iowa R. App. P. 4. However, where there is an issue involving a violation of basic constitutional safeguards, we make an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 12, 126-27 (Iowa 1975).

I.

Defendant was charged with aiding and abetting Steve Jacobson and John Skjoldal in breaking and entering the Moose Lodge in Ames. According to the testimony of Skjoldal, the State's key witness, the defendant and her accomplice, Diane Deaton, were acting as 'lookouts' while Skjoldal and Jacobson actually broke and entered the Moose Lodge. The defendant and Deaton were to warn Skjoldal and Jacobson if someone approached the lodge.

During the course of the trial, police officers testified as to statements made to them by Diane Deaton in the course of their investigation. The investigating officer testified that Deaton had admitted that she was a participant in the burglary and that she had provided a 'lookout' for the people that actually entered the building. The defendant objected to such evidence as hearsay and a denial of defendant's sixth amendment right of confrontation. The trial court overruled the objection.

The trial court also received testimony from defendant's former employer that the defendant admitted to him that she had entered the Moose Lodge. At the close of the State's case, the defendant moved for a judgment of acquittal on the ground that the State failed to corroborate the accomplice's testimony. The trial court overruled the motion, finding that the defendant's admission was sufficient to meet the corroboration requirement. The defendant was found guilty and she now appeals her conviction.

II.

Defendant's first contention is that she was denied her confrontation right by the admission into evidence of statements made by her accomplice, Diane Deaton. We disagree.

Defendant's reliance on Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965), is misplaced. In Bruton, the defendant was tried jointly with the co-defendant. The co-defendant exercised his right not to testify but his confession, which implicated himself and the defendant, was introduced into evidence. The Supreme Court held that a limiting instruction to the jury that the confession was inadmissible hearsay with regard to the defendant, was insufficient to protect defendant's right of cross-examination secured by the sixth amendment confrontation clause. Bruton, 391 U.S. at 126, 88 S. Ct. at 1622, 20 L. Ed. 2d at 479.

Similarly, in Douglas, the defendant's accomplice was called as a witness against the defendant but invoked his privilege against self-incrimination and refused to testify. The State produced and read from the accomplice's prior confession, stopping periodically to ask the accomplice if he had made the statement. The confession included a statement that defendant had fired the gun which wounded the victim. The court held that the inability to cross-examine the

accomplice regarding statements made in his confession denied defendant his right of confrontation; the confession being the only direct evidence that defendant had fired the gun. Douglas, 380 U.S. at 419, 85 S. Ct. at 1077, 13 L. Ed. 2d at 937.

The instant case is different from these cases in several crucial respects. The statements made by the accomplice in this case were admitted only to prove that a burglary had occurred; the hearsay and relevancy objections were overruled to allow the statements only for this limited purpose and not to show that defendant was involved in the burglary. Further, and most important, the accomplice's statements did not implicate the defendant in any way; defendant was not mentioned in the accomplice's statements which were introduced into evidence. A defendant's confrontation right is not violated when such a statement does not mention the defendant, or when all references to the defendant have been deleted before the statement is introduced into evidence. State v. Kern, 307 N.W.2d 22, 27 (Iowa 1981) (testimony of co-defendant did not implicate Bruton rule because it did not inculcate defendant); see also United States v. Hernandez, 608 F.2d 741, 749 (9th Cir. 1979).

Nevertheless, even if we were to find that the accomplice's statements did implicate defendant, it does not follow that defendant's conviction must be reversed. The admission of such statements will be constitutional harmless error if it did not affect the defendant's right to a fair trial. Schneble v. Florida, 405 U.S. 427, 430, 92 S. Ct. 1056, 1059, 31 L. Ed. 2d 340, 344 (1972); Harrington v. California, 395 U.S. 250, 254, 89 S. Ct. 1726, 1727, 23 L. Ed. 2d 284, 288 (1969); State v. McKinney, 631 F.2d 569, 571 (8th Cir. 1980) (per curiam); State v. Freeman, 297 N.W.2d 363, 367 (Iowa 1980). The Supreme Court in Schneble noted that:

The mere finding of a violation of the Bruton rule in the course of the trial, however, does not automatically require reversal of the ensuing

criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.

Schneble, 405 U.S. at 430, 92 S. Ct. at 1059, 31 L. Ed. 2d at 344 (emphasis added).

Harmless error will also be found based on the "cumulative nature of the disputed testimony." Freeman, 297 N.W.2d at 367.

In Schneble, the defendant and his co-defendant were charged jointly with murder but neither took the stand at trial. The police testified as to admissions made by each defendant which implicated the other. Both were convicted and the defendant appealed claiming a violation of his right of confrontation. Under these facts the court held that:

[j]udicious application harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares us in the face. . . .

Having concluded that petitioner's confession was considered by the jury, we must determine on the basis of "our own reading of the record and on what seems to us to have been the probable impact . . . on the minds of an average jury," . . . whether [co-defendant's] admissions were sufficiently prejudicial to petitioner as to require reversal. In Bruton, the Court pointed out that "[a] defendant is entitled to a fair trial but not a perfect one." . . . Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. . . . In this case, we conclude that the "minds of an average jury" would not have found the State's case significantly less persuasive had the testimony as to [co-defendant's] admission been excluded. The admission into evidence of these statements, therefore, was at most harmless error.

Schneble, 405 U.S. at 432, 92 S. Ct. at 1059, 31 L. Ed. 2d at 345. (citations omitted).

In the instant case the jury had defendant's own admission to consider as

well as the testimony of John Skjoldal. This was both overwhelming and cumulative evidence of defendant's guilt. Thus, while the court admitted the accomplice's statements to show that a burglary had taken place, even if these statements implicated defendant in a slight way, we believe that it amounted to only harmless error. We find, therefore, that under Bruton and its progeny, defendant's confrontation rights were not violated.

We are also convinced that defendant's confrontation rights were not violated because the accomplice's statements were hearsay. The accomplice was unavailable to testify because she exercised her fifth amendment right against self-incrimination. See United States v. Robinson, 635 F.2d 363, 364 (5th Cir. 1981); Mayes v. Sowders, 621 F.2d 850, 856 (6th Cir. 1980). We believe the court was also correct to conclude that there are indicia of reliability which insure the trustworthiness of the accomplice's statements. See Ohio v. Roberts, 48 U.S. 56, 66, 100 S. Ct. 2531, 2539, 65 L. Ed. 2d 597, 607-08 (1980); Morrow v. Wyrick, 646 F.2d 1229, 1232 (8th Cir. 1981) (confrontation clause requires a showing that declarant is unavailable and that statement bears adequate "indicia of reliability.") It has been held that reliability can be inferred where the case falls within a firmly rooted hearsay exception. Id. One such exception is the out of court declarant's statement against his or her penal interests. See Fed. R. Evid. 804(b)(3); United States v. Riley, 657 F.2d 1377, 1383 (8th Cir. 1981). In Riley, the court made clear that the statement against interest made by an unavailable witness "must so far tend to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true, and [that the] corroborating circumstances clearly indicate the trustworthiness of the statement." Id. This test is clearly met in the instant case since the accomplice was unavailable, had been given her Miranda warnings, and made her statements with full knowledge that she could be

convicted for her participation in the crime. Her statements were corroborated by the testimony of John Skjoldal. We thus believe that her statement was against Diane Deaton's penal interests and that the corroborating circumstances insure the trustworthiness of the statements. The trial court did not err, therefore, in finding that introduction of Diane Deaton's statements did not violate defendant's right of confrontation.

III.

The defendant's final contention is that the court erred in overruling her motion for judgment of acquittal based on the lack of corroboration of accomplice John Skjoldal's testimony. The gist of defendant's argument is that accomplice Skjoldal's testimony implicated defendant as only an aider and abetter and thus, the evidence that she admitted to acting as a principal in the crime of breaking and entering is insufficient to corroborate Skjoldal's testimony. We find this argument without merit.

In State v. Graham, 291 N.W.2d 345, 350 (Iowa 1980), the court set forth the legal principles concerning accomplice testimony as follows:

[Iowa Rule of Criminal Procedure] 20(3) precludes convictions on the basis of uncorroborated accomplice testimony. The existence of corroborative evidence is a question of law to be determined by the court; its sufficiency to lend credibility to the testimony of the accomplice is a question of fact which is left to the determination of the jury. State v. Nepple, 211 N.W.2d 330, 331-32 (Iowa 1973). "The statutory requirement is met if it can fairly be said the accomplice is corroborated in some material fact tending to connect the defendant with the commission of the crime." State v. Vesey, 241 N.W.2d 888, 890 (Iowa 1976).

Defendant challenges that, as a matter of law, there was no corroborative evidence since she admitted participating in the crime to a greater extent than that testified to by her accomplice. But the fact that there may be inconsistent versions as to the extent of defendant's participation in the crime goes to the

weight the jury will give the testimony, not to whether the corroboration exists as a matter of law. See State v. DeWitt, 286 N.W.2d 379, 385 (Iowa 1979). We believe that defendant's admission corroborates Skjoldal's testimony "in some material fact tending to connect defendant with the commission of the crime"; defendant was present and participated in the accomplishment of the burglary.

Having found no error in any of the trial court's rulings, we affirm the conviction.

AFFIRMED.

Johnson and Schlegel, JJ., specially concur, and Oxberger, C.J., and Snell, J., dissent.

I concur with the result reached by the majority on the grounds that the admission of the testimony concerning Diane Deaton's statement, while error, was harmless error such as did not interfere with defendant's right to a fair trial. I would affirm.

Johnson, J., joins this special concurrence.

OXBERGER, C.J., (dissenting).

I respectfully dissent. The majority holds the defendant was not denied her constitutional right of confrontation of a witness against her. The witness, Diane Deaton, did not testify in person. Her testimony was obtained through a police officer testifying as to what she allegedly told him.

The majority holds Ms. Deaton's statement was harmless error because the co-defendant, Mr. Skjoldal, testified that the defendant committed the crime and, furthermore, a co-worker testified that defendant told him she was guilty. They hold that this evidence constituted overwhelming and cumulative evidence of defendant's guilt. I do not find a co-defendant's testimony overwhelmingly persuasive, since he may be testifying for ulterior motives. Nor is the co-worker's testimony in this case overwhelming. He testified that the defendant admitted going into the Moose Lodge at the time of the burglary. All of the other State's witnesses deny the defendant entered the Moose Lodge or played a principal role in the burglary.

The majority also finds that Ms. Deaton's statement did not implicate the defendant in any way. Although Ms. Deaton's statement did not say the defendant committed the burglary, it was nevertheless extremely damaging. The third co-defendant, Mr. Skjoldal, testified the defendant was guilty of aiding and abetting him in the crime of burglary. The prosecutor, in his statements to the trial court concerning admissibility of Ms. Deaton's statement, said: "It certainly is supportive of Mr. Skjoldal's testimony. It certainly enhances his credibility."

Obviously this is the primary reason Ms. Deaton's statement was offered by the prosecution. The fact that the statement did not directly implicate the defendant was not of great concern to the prosecutor because the statement corroborated Mr. Skjoldal's direct accusations against the defendant in all other particulars.

I would hold Ms. Deaton's statement inadmissible and remand for a new trial.

Snell, J., joins in this dissent.